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No. 80-2162

In the Supreme Court of the United States

OCTOBER TERM 1981

RAMAH NAVAJO SCHOOL BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.
Appellants,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Appellee

ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS
and
BRIEF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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The Navajo Tribe of Indians respectfully moves this Court, pursuant to Rule 36 of the Rules of the United States Supreme Court, for leave to file the annexed brief *amicus curiae*. In support of this motion, the Navajo Tribe states:

1. The Navajo Tribe of Indians (the Navajo Tribe) is a federally recognized Indian Tribe and is the largest such tribe in the United States, comprised of one hundred sixty thousand members and occupying 25,000 square miles of trust lands within the states of Arizona, New Mexico and Utah.

2. The issue presented in this case—the extent, if any, of a state's power to tax the activities of non-Indians performing federally-funded, federally-regulated work on tribal lands—will determine whether, after *White Mountain Apache* and *Central Machinery*,[1] Indian tribes must share with states those funds ear-marked by Congress to further the national interest in Indian education.

3. The outcome of this appeal will determine whether federally funded programs implementing rights guaranteed to the Navajo Tribe by the Treaty of 1868 can be crippled by the diversionary interference of state taxation.

4. The Navajo Tribe of Indians was granted leave to file, and did file, a Jurisdictional Statement Amicus Curiae In Support of Appellants pursuant to Order of this Court dated November 30, 1981.

For the foregoing reasons, the Navajo Tribe of Indians respectfully requests that its motion for leave to file the annexed brief *amicus curiae* be granted.

Dated this _____ day of January, 1982.

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[1]*White Mountain Apache Tribe v. Bracker* 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

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BRIEF OF AMICUS CURIAE THE NAVAJO TRIBE OF INDIANS IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The Navajo Tribe of Indians is the single largest federally recognized Native American tribe, comprised of approximately 160,000 residents occupying 25,000 square miles of trust land in Arizona, New Mexico and Utah.

Numerous federally-funded programs are carried out on Navajo land with the help of services rendered by non-Indians. These services are taxed by the states, with the tax then passed through to the tribe to be paid with part of the federal funds.

States are notorious for their failure to provide governmental services to Indian peoples. Thus, funds diverted by the states from federal Indian programs are, for all practical purposes, lost to the tribe.

Where, as here, the federal funds are intended to build schools and where, as here, the federal government has by treaty committed itself to such school construction, the diversion by state tax laws of federal funds is particularly unconscionable and is, in fact, unlawful under the decisions of this Court.

SUMMARY OF ARGUMENT

State governments are experiencing a tax windfall from the mere presence of Indian tribes within their borders. Federal monies, appropriated by the millions to fund projects on Indian reservations in fulfillment of treaty and trust responsibilities, are consistently diverted to State coffers by means of taxes levied on non-Indians who work on the reservations, paid by federal funds, to carry out the federally-authorized projects.

Such taxation is impermissible where the non-Indian's services fall under a scheme of comprehensive federal regulation and where the services entail subject matter which goes to the core of tribal self-government.

Indian education exemplifies the appropriate circumstance for the application of the federal doctrine of preemption. The Navajo Tribe, through the Ramah Navajo School Board, petitioned the federal government for financial assistance. The response of the Congress was one of overwhelming support. Funds were allocated by Congress for the construction and improvement of educational facilities in Ramah. It is these funds which New Mexico diminished with its gross receipts tax. It is this tax which, the Navajo Tribe of Indians respectfully submits, should be held by this Court to be preempted by federal law.

SELF-GOVERNMENT, AT A MINIMUM, ENTAILS THE ABILITY TO EDUCATE CHILDREN: THE QUALITY AND AVAILABILITY OF NAVAJO SCHOOLING IS DIRECTLY AND SEVERELY IMPACTED BY STATE TAXES SIPHONING FEDERAL FUNDS FROM SCHOOL CONSTRUCTION PROJECTS.

In 1959, with the decision in *Williams v. Lee*, 358 U.S. 217 (1959), this Court began the modern era of federal Indian law. The impact of this decision has been felt in every subsequent case examining the scope of Indian tribal sovereignty. The precise question before the Court in 1959 was whether a non-Indian could bring a civil suit in state court against a Navajo for events arising on the Navajo Reservation. This Court required the non-Indian to seek relief in tribal courts, concluding that:

> There can be no doubt but that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.

358 U.S. at 223.

The *Williams v. Lee* standard has been characterized as prohibiting application of a state law "which frustrates tribal self-government." *Moe v. Salish & Kootenai Tribes,* 425 U.S. 463, 483 (1976) (upholding a state law requiring Indian sellers to collect a state tax from non-Indian buyers, pointedly observing that the state law was not a tax, finding the collection to be a minimal burden which did not frustrate tribal self-government).

The *Williams v. Lee* test was a major element of this Court's recent holding in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980) which struck down a state tax on a non-Indian's services rendered on a reservation to an Indian tribe.

> Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl.3. *See United States v. Wheeler, supra,* 435 U.S., at 322-323. This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. *See, e.g., Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685 (1965); *McClanahan v. Arizona State Tax Comm'n, supra.* Second, it may unlawfully infringe 'on the right of res-

ervation Indians to make their own laws and be ruled by them.' *Williams v. Lee*, 358 U.S. 217, 220 (1958). 448 U.S. at 142. (Some citations omitted.)

Williams v. Lee and its progeny do not of themselves invalidate the New Mexico tax on the Ramah school contractor. Preemption has instead been the favored legal theory in this regard. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); *White Mountain Apache, supra; Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685 (1965).

Nevertheless, the nexus between the construction and future health of the Ramah school project and the self-government of the Navajo Tribe is of sufficient strength and merit as to provide an important backdrop for this Court to render its decision on preemption. *White Mountain Apache v. Bracker, supra* at 143. ("The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law."); *Moe v. Salish & Kootenai Tribes, supra* at 475. ("In *McClanahan* this Court considered the question whether the State had the power to tax a reservation Indian, a Navajo, for income earned exclusively on the reservation. We there looked to the language of the Navajo treaty and the applicable federal statutes 'which define the limits of state power.' 411 U.S. at 172. Reading them against the 'backdrop' of the Indian sovereignty doctrine, the Court concluded 'that Arizona ha[d] exceeded its lawful authority' by imposing the tax at issue."); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) ("The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because

it provides a backdrop against which the applicable treaties and federal statutes must be read.")

Education is acknowledged by this Court to be a primary function of government, whether federal, state or tribal. *Brown v. Board of Education,* 347 U.S. 483, 493 (1954) ("Today, *education is perhaps the most important function of state and local governments.* Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today *it is a principal instrument in awakening the child to cultural values,* in preparing him for later professional training, *and in helping him to adjust normally to his environment.*" Emphasis added.)

The importance of formal education to Indian societies in the twentieth century is well documented, as is the need for tribal control of such education. The American Indian Policy Review Commission established a separate task force to address this one issue alone. With respect to tribes in general, the education task force in 1976 reported that:

> The last major policy review of Indian affairs was in 1928—some forty-eight years ago. Since that time, very little has changed in Indian education. The types of schools are the same, and the federal agencies administering the services and programs are the same. Limited respect for Indian culture and limited development of Indian curriculum has been initiated. Yet, surveys, studies and investigations have occurred with growing momentum each year. It is time for the U.S.

> Congress to realize that it has been grossly negligent in the area of policy making and financing for Indian education. Congress has given Indians piecemeal efforts and totally inadequate financing in this area. They have abdicated Congressional intent to administrative discretion. At the beginning of the new Bicentennial year, *Congress should declare a policy of support and financing for Indian community control of all aspects of Indian education. The obligation and right to an education which all Indians feel they have from the Congress and the federal government should be fulfilled.*

Final Report to the American Indian Policy Review Comm'n, Task Force Five: Indian Education at 13 (1976). (Emphasis in original.)

Section VI of the task force report is a special study of Navajo education. The most pertinent observations of the task force with respect to the link between the Ramah school and Navajo Tribal self-government are as follows:

> The inherent potential advantage for the public school is community and local control through the election of a school board. The Navajo themselves can elect the school board members. In this way, there can be complete Navajo control of public school districts if the Navajo people choose to take such action.
>
> * * *
>
> An adequate system of Navajo education will never be possible until adequate educational facilities equal to those available to off-reservation students are provided. Up to this point, the Congress of the United

States has failed to support this principle in its implementation and practice.

* * *

General Recommendations.—The following policy implementation is essential to the proper growth and development of a quality system of Navajo education which meets the needs of individual students.

Adequate Finances.—Whether it be Bureau of Indian Affairs, Public School, Contract School or other, the financial needs of all of these is acute and is growing more serious with each passing day. While it is certainly true that money is never the complete answer, it is equally true that without an adequate, secure source of money, Navajo education can never embark upon bold plans which will strengthen Navajo education.

Id. at 176, 177, and 188.

The importance of Navajo control of schools as an essential element of tribal self-government is described in detail by a report of the United States Commission on Civil Rights, "The Navajo Nation: An American Colony" (1975).

> This plan [of the Navajo Tribe] for Navajo authority over all reservation schools was just one aspect of the common theme throughout the Window Rock hearing: the desire for self-determination in the tribe's own affairs. In education, the groundswell developing around that concept became apparent in the testimony of students, parents, and teachers, who traced many of the school's problems to the century-old conflict between the Navajo and Anglo cultures.
>
> * * *
>
> As an alternative to both public and BIA schools,

the Navajo people have taken some steps toward local control of the schools. At the time of the hearing, there were four experimental Navajo-controlled schools on the reservation.[242] Formerly run by the BIA, each of the incorporated schools had a BIA contract for community operation with BIA funding.

The emphasis in the contract schools is on making education relevant to the Navajo child living in a Navajo community. Much of the instruction is done in Navajo, using a bilingual method of course presentation. The curriculum is largely bicultural, so that the Navajo students learn about their history and culture.

* * *

242. Borrego Pass, Ramah, Rock Point, Rough Rock: referred to also as 'BIA contract schools,' or 'demonstration schools.'

Id. at 60, 70, 70 n.242.

The importance of education to the Navajo Tribe is demonstrated by the Navajo Tribal Code which contains twenty-three titles, one of which, Title 10, is devoted solely to education. The tribal education laws govern such basics as the provision of clothing, 10 N.T.C. § 701, and scholarship monies, 10 N.T.C. § 901. The code provides a procedure for obtaining rent-free tribal lands for schools, 10 N.T.C. § 1201, and for establishing Local Navajo Community School Boards, 10 N.T.C. § 201. Provisions are made for adult education, 10 N.T.C. § 1401, and community colleges, 10 N.T.C. § 2001.

The Ramah Navajo School Board is an entity of the Navajo Tribe created pursuant to 10 N.T.C. § 201, a codification of Navajo Tribal Council Resolution CAU-87-69.

The authorizing resolution contains a preamble which begins:

> Whereas: (1) the Navajo Tribe is committed to the continuous improvement in the quality of education available to the Navajo People, and (2) The Navajo People have demonstrated a willingness and a desire to have greater participation in local school affairs, and (3) Local School Boards would improve the quality of education on the Navajo Reservation. . . .

Ramah is one of 109 Chapters (local governmental units akin to counties) of the Navajo Tribe. To date, over 80 Chapters have taken advantage of the authorizing resolution to form local school boards. The success of each will depend in large part on the availability of adequate financing. The extent to which the Chapters successfully exert local control over state or BIA schools will depend in large part on the financial resources of these "Navajo-controlled" schools.

If Ramah and other Navajo school boards must divert federal funds from school construction to state tax coffers, Navajo education, and with it tribal local self-government, suffers.

It is against this backdrop of tribal sovereignty, in general, and the Navajo educational crisis, in particular, that the question of federal preemption of the New Mexico gross receipts tax must be determined.

THE FEDERAL GOVERNMENT THROUGH TREATIES, SPECIFIC ACTS OF CONGRESS REGARDING RAMAH, AND COMPREHENSIVE INDIAN TRADER REGULATIONS HAS PREEMPTED THE NEW MEXICO GROSS RECEIPTS TAX.

In the unique area of taxation this Court has repeatedly applied the doctrine of preemption to invalidate a state tax falling upon a non-Indian for work performed on an Indian reservation.

The seminal decision in 1965 *Warren Trading Post v. Arizona Tax Comm'n, supra,* voided a state tax on an Indian trader on the basis of federal preemption:

> These apparently all-inclusive regulations [governing Indian traders] and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.
>
> * * *
>
> This state tax on gross income would put financial burdens on appellant *or the Indians with whom it deals* in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.

380 U.S. at 690, 691. (Emphasis added.)

Fifteen years later the Court again addressed the issue of federal preemption of a state tax on non-Indians for work performed on a reservation. In *White Mountain Apache*

Tribe v. Bracker, supra, the Court painstakingly set forth the standards to be applied where preemption is at issue:

> Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. We have thus reflected the proposition that in order to find a particular state law to have been pre-empted by operation of federal law, an express congressional statement to that effect is required.
>
> * * *
>
> [W]e have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of State or tribal sovereignty, but has called for a particularized inquiry into the nature of the State, Federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

448 U.S. at 143, 144. (Citations omitted.)

The Court then applied these standards in the *White Mountain Apache* decision highlighting those aspects of federal law and regulation it found to be controlling:

> At the outset we observe that the Federal Government's regulation of the harvesting of Indian timber is comprehensive. That regulation takes the form of Acts of Congress, detailed regulations promulgated by

the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs.

* * *

The Secretary has also promulgated detailed regulations governing the roads developed by the Bureau of Indian Affairs.

* * *

In these circumstances we agree with petitioners that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. . . . There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, respondents have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation.

448 U.S at 145, 148. (Citations omitted.)

In *Central Machinery Co. v. Arizona State Tax Comm'n, supra,* the Court further extended *Warren Trading Post:*

It is irrelevant that appellant is not a licensed Indian trader. . . . It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations.[4]

* * *

[4]In any event, it should be recognized that the transaction at issue in this case was subjected to comprehensive federal regulation. . . . [T]he Bureau of Indian Affairs had approved both the contract of sale for the

tractors in question and the tribal budget, which allocated money for the purchase of this machinery. 448 U.S. at 164, 165.

The *Warren Trading Post, White Mountain Apache* and *Central Machinery* decisions provide the guideposts for this Court's determination of the Ramah tax issue. To show preemption of the New Mexico gross receipts tax, the Ramah school board (or any similar tribal entity) must show (1) the existence of a federal regulatory scheme (treaties, Acts of Congress, regulations of the Secretary of the Interior, actual Bureau of Indian Affairs involvement), (2) obstruction of federal policies and (3) the lack of a regulatory function or service performed by the State that would justify the tax.

First, with respect to the federal regulatory scheme, the position taken by the Ramah school board in this suit is fully supported. The Treaty of 1868, Art. VI states in pertinent part that "the necessity of education is admitted" and, therefore, "the United States agrees that, for every thirty children between [six and sixteen years of age] who can be induced or compelled to attend school, a house shall be provided." 15 Stat. 667, 669. Although by its terms this treaty guarantee was for only ten years, this Court recognized the 1868 treaty obligation in 1965 in *Warren Trading Post v. Arizona Tax Comm'n, supra.* ("And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians." 380 U.S. at 690.) With respect to the preemptive value of the Navajo treaty, this Court has stated: "The treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But the document is not to be read as an ordinary contract agreed

upon by parties dealing at arm's length with equal bargaining positions. . . . [T]his Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation." *McClanahan v. Arizona State Tax Comm'n, supra,* at 174, 175.

The federal regulatory scheme is further demonstrated by Acts of Congress authorizing and funding Indian education programs of benefit to all tribes. *See, e.g.,* the Johnson O'Malley Act, 25 U.S.C. § 452, 48 Stat. 596, as amended by 49 Stat. 1458. ("The Secretary of the Interior is authorized . . . to enter into a contract or contracts . . . for the education . . . of Indians . . . ") Indian Education Act, Pub. L. 92-318, 86 Stat. 334, 20 U.S.C. § 887c ("the Commissioner shall carry out a program of making grants for the improvement of educational opportunities for Indian children [for specific projects]") and the Indian Self-Determination and Educational Assistance Act, 25 U.S.C. § 450 *et seq.,* 88 Stat. 2203 ("The Secretary is authorized to enter into a contract or contracts with any . . . school district [to assist] in the acquisition of sites for, or the construction, acquisition, or renovation of facilities . . . if such facilities are necessary for the education of Indians." 25 U.S.C. § 458 (a)).

Congress has also enacted laws relating specifically to Navajo education. In the Navajo-Hopi Rehabilitation Act of 1950, 64 Stat. 44, Congress authorized and directed the Secretary of the Interior to undertake a program of basic improvements including an expenditure "(12) School buildings and equipment, and other educational measures, $25,000,000." 25 U.S.C. § 631.

Of particular import to this case, Congress spoke directly to the need for a school in Ramah authorizing and

funding the design and construction of the Ramah school with a series of appropriations measures. Pub. L. 93-120, 87 Stat. 431; Pub. L. 93-245, 87 Stat. 1073; Pub. L. 93-404, 88 Stat. 810; Pub. L. 94-165, 89 Stat. 985; Pub. L. 95-74, 91 Stat. 293.

The federal regulatory scheme governing the construction of the Ramah school is again exemplified by regulations issued by the Secretary of the Interior. *See, e.g.*, 25 C.F.R. Parts 271 and 274, implementing the Indian Self-Determination Act, *supra;* 25 C.F.R. Part 31(a), implementing Pub. L. 95-561, 25 U.S.C. § 2001 *et seq.;* 25 C.F.R. Part 252, implementing the Indian Trader Statutes, 25 U.S.C. §§ 261-264.

Finally, as with *Central Machinery*, the Bureau of Indian Affairs was involved in the approval of the construction contracts.

This federal regulatory scheme fulfills the tests of *Warren Trading Post* and *White Mountain Apache*. The regulations are "comprehensive," 448 U.S. at 145, and "all-inclusive," 380 U.S. at 690, such that "no room" remains for state taxes, 448 U.S. 148, 380 U.S. at 690. The scheme is "so pervasive as to preclude the additional burdens," 448 U.S. at 148, of state taxation. Moreover, the federal regulatory scheme is evidenced by "the language of the relevant federal treaties and statutes," 448 U.S. at 144.

The second major preemption test of *Warren Trading Post v. Arizona Tax Comm'n, supra,* and *White Mountain Apache Tribe v. Bracker, supra,* is whether the state tax "could disturb and disarrange the statutory plan Congress set up," 380 U.S. at 691, or "obstruct federal policies," 448 U.S. at 148.

Congress allocated specific sums to be used for the *construction* of the Ramah school. A New Mexico law that diverts a quarter of a million dollars targeted for Ramah to totally unrelated state programs "disturb[s] and disarrange[s] the statutory plan." Similarly, such a diversion "obstructs federal policies" such as those set forth in the Indian Education Act, *supra* at 20 U.S.C. § 241aa ("In recognition of the special educational needs of Indian students in the United States, Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies to develop and carry out elementary and secondary school programs specially designed to meet these special education needs."); Indian Self-Determination Act, *supra,* ("The Congress further finds that . . . (3) parental and community control of the educational process is of crucial importance to the Indian people." 25 U.S.C. § 450(b) (3). "Congressional declaration of policy . . . (c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being." 25 U.S.C. § 450a.); or in the regulations implementing Pub. L. 95-561 ("§ 31a.4 Policies . . . (p) *Education close to home.* Provide day and residential educational services as close to an Indian or Alaska Native student's home as possible. . . ." 25 C.F.R. Part 31a, emphasis in original.)

The third major test for federal preemption of state tax law is described in *White Mountain Apache Tribe v. Bracker, supra,* as whether or not there exists a "regulatory function or service performed by the State that would justify" the

imposition of the New Mexico gross receipts tax on Lembke Construction Company. 448 U.S. at 148. The test is derived from *Warren Trading Post v. Arizona Tax Comm'n, supra,* which held:

> [S]ince federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

380 U.S. at 691.

With respect to the present Ramah tax issue, New Mexico is in a poor position to urge that it has any interest other than a "general desire to raise revenue." 448 U.S. at 150. New Mexico closed its Ramah educational facilities, so certainly the money diverted from the Ramah school project is not returned in the form of educational services from the State of New Mexico. In fact, New Mexico would be hard put to identify *any* service it provides the Ramah community. Having defaulted on the duty of providing education to the Navajo children in Ramah, the State of New Mexico is estopped under *Warren Trading Post v. Arizona Tax Comm'n, supra,* from asserting "the privilege of levying this tax." 380 U.S. at 691.

The conclusion to *White Mountain Apache, supra,* might well have been written for Ramah:

> Moreover, it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe.[15] Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose,

and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible. [Footnote 16 omitted.]

* * *

[15]Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted, as *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Co. v. Arizona Tax Comm'n, supra*, makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Co. v. Arizona Tax Comm'n, supra*, leaves no room for the additional burdens sought to be imposed by state law.

448 U.S. at 151.

Federal funds intended to furnish a building for Ramah Navajo students should not be diminished by state taxation. The federal regulatory scheme leaves no room for the imposition of the burdensome New Mexico gross receipts tax, a tax of no discernible benefit to Ramah.

CONCLUSION

The resolution of issues raised by the present impact of state tax laws on Indian education programs authorized, encouraged and funded by the Federal Government will determine the extent to which a State may interpose its power of taxation to impede the fulfillment of federal Treaty obligations. Surely a state government cannot be permitted

to first deprive the Navajo of a needed state-funded educational facility and then tax the Navajo effort to provide its own facility. Where, as here, the obligation is one of highest import to Navajo self-government and where, as here, the federal regulatory scheme is all pervasive, the state tax must give way. The Navajo Tribe of Indians respectfully submits that Federal legislation read against the backdrop of tribal sovereignty preempts the application of the New Mexico gross receipts tax to Lembke Construction Company for activities on Navajo land in furtherance of the completion of the Ramah school project.

For the foregoing reasons the decision of the Court of Appeals for the State of New Mexico should be reversed.

Respectfully submitted, January, 1982.

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